In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–139

WILLIAM ALOISIO AND STANLEY JASINSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 70–259

CHARLES BARTOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (see Pet. No. 70–139, App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1971. Petitions for rehearing were denied in No. 70–139 on April 9, 1971, and in No. 70–259 on May 10, 1971. The petition for a writ of certiorari in No. 70–139 was filed on April 28, 1971, and the petition

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in No. 70–259 was filed on June 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the cross-examination of a government witness was improperly curtailed (both petitions).

2. Whether it was proper to receive into evidence the hearsay declarations of a co-conspirator which were made during the course and in furtherance of the illegal venture (No. 70–139).

3. Whether in the circumstances of this case the arrest of petitioner Jasinski—which resulted in the obtaining of his fingerprints—was consonant with Fourth Amendment requirements (No. 70–139).

4. Whether the indictment was invalid because it was based in part on hearsay (No. 70–259).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy and various substantive offenses involving the counterfeiting of United States Treasury notes, in violation of 18 U.S.C. 371, 472–474.[1] Petitioners Aloisio and Jasinski were each sentenced to concurrent prison terms of five years; petitioner

[1] Petitioner Aloisio was convicted of three substantive counts (Counts 4–6), Jasinski of four (Counts 3–6), and Bartoli of two (Counts 2, 7).

They were tried with three others (Carter, Murray and Solomon); Carter was acquitted. Two other co-indictees, Davison and Mrs. Grace Cosentino, had their cases severed (T. 6, 8, 104). Before trial, Davison pleaded guilty and at petitioners' trial was a government witness. After the instant trial was concluded, Mrs. Cosentino pleaded guilty. She was not a witness at the instant trial.

Bartoli was sentenced to concurrent prison terms of ten years on the substantive counts and a concurrent five-year term on the conspiracy charge.

In August 1967, Mrs. Grace Cosentino asked Ted Kay, whom she had known for some years (T. 1405),[2] whether he was interested in selling counterfeit notes that she and "her boy friend 'Smokes'" (petitioner Aliosio) (T. 1342–1343, 1398, 741) intended to produce (T. 1345–1350, 1353). Kay was promised ten percent of the selling price for his services (T. 1343). In September 1967, Kay notified the Secret Service and thereafter cooperated with the government (T. 1417).

In December 1967, Mrs. Cosentino told Kay of production difficulties but said that, when produced, the counterfeit would be "within 15%" of a genuine note in appearance (T. 1355). She also told him that when a sale was made either co-defendant Solomon or petitioner Aloisio ("Smokes") would provide "protection" to all the parties (T. 1356).

At that time Mrs. Cosentino gave petitioner Bartoli instructions to obtain cash to pay for numbering machines to be used in the counterfeit operation (T. 1352–1353). Under an assumed name, Bartoli purchased genuine United States Treasury obligations which were subsequently used to produce the counterfeit notes (T. 124, 143–144, 481–484, 780). On January 15, 1968, co-indictee Davison and co-defendant Murray prepared a sample counterfeit print of a $10,000 government note (Government Exhibit 6) (T. 142, 153, 162, 217–218). On January 18, 1968,

[2] "T." refers to the multi-volume trial transcript on file with the Clerk of this Court.

with Davison's help, Murray printed approximately five hundred copies, including one group of ninety-nine (Government Exhibit 7) (T. 222–226). One of these ninety-nine notes was later found to contain a latent fingerprint of Bartoli (T. 531, 538, 554, 1856, 2123).

In mid-January, Kay introduced Secret Service agent Gibbs to Mrs. Cosentino as a potential buyer of the counterfeit notes (T. 1601–1602). On the day following the printing of the sample note (Government Exhibit 6), Mrs. Cosentino delivered it to agent Gibbs in Chicago, concealed in a magazine. This magazine was later found to contain a latent fingerprint of Jasinski (T. 530, 555, 594, 1573, 1576). At the time she delivered this sample, Mrs. Cosentino described its fine workmanship to agent Gibbs and stated that the bulk run of counterfeit notes would be numbered by a stolen numbering machine of a type "used exclusively by the Government in their printing" (T. 1606–1607). Mrs. Cosentino and agent Gibbs thereafter agreed on a selling price for the counterfeit and the method of delivery and payment (T. 1609).

January 22, 1968, was fixed as the date of initial delivery. On that date Mrs. Cosentino, co-defendant Solomon and Kay delivered ninety-nine counterfeit $10,000 notes to Gibbs at his motel room (T. 1623–1637). While waiting for payment in genuine currency, Mrs. Cosentino and Solomon assured Gibbs that nobody was going "to heist" him since "their partners were across the street from the motel in an automobile" (T. 1639). Mrs. Cosentino and Solomon were then arrested (T. 1641).

During the approximately one-half hour that these events had been taking place in the motel, another government agent on duty outside observed petitioners Aloisio and Jasinski as they sat in a parked vehicle with the engine running; the automobile was positioned so that petitioners could observe the rear of agent Gibbs' motel room (T. 957, 959, 1014, 1021, 1024, 1054, 1639). Upon receiving a radio report of the motel arrests, Secret Service agents arrested Aloisio and Jasinski in the parking lot (T. 961).

ARGUMENT

1. The government informer, Kay, was extensively cross-examined by the defense as to his background and employment record. He admitted that he had stolen money from a former employer, that he had worked for a time as a gambler and that, in return for $5,000, he had made a false affidavit in an effort to aid a defendant in a criminal prosecution (T. 1470, 1475–1485). The defense further elicited on cross-examination that Kay was under indictment for the federal crimes of income tax evasion and the transportation of a stolen bond.[3] The trial court did not require Kay to respond to defense questioning concerning his guilt of the charges pending against him (T. 1492, 1514, 1515) and petitioners in No. 70–139 contend that this limitation of cross-examination constituted reversible

[3] Kay also testified that he had no idea that his aid to the government in the present case would be beneficial in the disposition of the charges against him but hoped that such cooperation would be recognized (T. 1403–1405, 1457, 1492, 1507, 1516).

error (Pet. 13–14). This claim is without merit. The extent of cross-examination into collateral matters is discretionary with the trial court. See *Alford* v. *United States,* 282 U.S. 687, 694; *United States* v. *Kelly,* 349 F. 2d 720, 775 (C.A. 2), certiorari denied, 384 U.S. 947. It is not error to sustain objections to questions concerning criminal acts which are subject to pending indictments. *United States* v. *Amabile,* 395 F. 2d 47, 50–51 (C.A. 7), vacated and remanded on other grounds, 394 U.S. 310; *United States* v. *Irwin,* 354 F. 2d 192, 198 (C.A. 2), certiorari dened, 383 U.S. 967. Moreover, such interrogation was particularly marginal in the present case, in view of the defense's exhaustive inquiry into Kay's background. The jurors knew that he had lied and cheated in the past; the court was not required to permit further inquiry into the factual foundation of offenses unconnected with the issues at trial.

2. Petitioners Aloisio and Jasinski claim (Pet. No. 70–139, pp. 5–8) that there was a lack of independent evidence linking them to the criminal venture and that Mrs. Cosentino's declarations during the pendency of the conspiracy violated their rights of confrontation. As the opinion of the court of appeals shows, there was evidence of Aloisio's conversation with Mrs. Cosentino by telephone concerning the illegal transactions during one of her meetings with agent Gibbs (Pet. No. 70–139, App. A 4–7). Since petitioner Aloisio also served as a lookout, the court could properly conclude that there existed independent nonhearsay evidence of his illicit participation. Petitioner Jasinski's fingerprint on the magazine and his subse-

quent service as a lookout were also sufficient independent evidence to tie him to the scheme.[4] See *Glasser* v. *United States*, 315 U.S. 60, 74; *United States* v. *Bey*, 437 F. 2d 188, 191 (C.A. 3). Against this background, Mrs. Cosentino's declarations during the ongoing criminal venture as to their part in furtherance of the scheme were admissible under a recognized exception to the hearsay rule and constituted no denial of the right of confrontation. *Dutton* v. *Evans*, 400 U.S. 74, 81.

3. There is no substance to the argument that the arrest of petitioner Jasinski was without probable cause and that accordingly the fingerprints taken from him following the arrest, which matched the print on the magazine containing the sample note which Mrs. Cosentino had delivered to agent Gibbs in mid-January, was improperly admitted into evidence (Pet. No. 70–139, pp. 15–18).

Petitioner Aloisio had been identified as a member of the Cosentino group at least as early as December 1967, and had been under surveillance since January 17, 1968 (*e.g.*, T. 823–824, 875–877, 902, 949, 953, 1156, 1258, 1350, 1448). The officers, who saw Aloisio and Jasinski maintain the vigil outside agent Gibbs' motel room (no other automobile was in the parking lot at the time), could properly conclude that both men were serving as lookouts. Indeed, Mrs. Cosentino

[4] The fact that the independent evidence relating to petitioners was not received until late in the trial is not material; the order of proof in a conspiracy case is within the discretion of a trial court. *Strauss* v. *United States*, 311 F. 2d 926, 931 (C.A. 5), certiorari denied, 373 U.S. 910.

informed agent Gibbs at this time that two people were "across the street covering the deal" (T. 1639). The engine of the automobile was running and the officers were justified in moving in rapidly to effectuate the arrest without a warrant. Contrast *Coolidge* v. *New Hampshire,* No. 323, October Term, 1970, decided June 21, 1971. Nor is *Davis* v. *Mississippi,* 394 U.S. 721, relevant, for here the agents had probable cause to arrest the two petitioners.[5]

4. Petitioner Bartoli contends that the indictment should have been dismissed because its return was based upon hearsay evidence. We note, first, that agent Cozza—the supervisory agent who appeared before the grand jury—had some personal knowledge of the events. He had conducted surveillances of various defendants, overheard one conversation between Mrs. Cosentino and informant Kay, introduced agent Gibbs to Kay, and supervised and assisted in the arrests (T. 537, 540, 1156–1180, 1237, 1278, 1360, 1439). In any event, it is well established that the fact that an indictment is based on hearsay does not require reversal of a conviction. *Costello* v. *United States,* 350 U.S. 359, 364; cf. *Lawn* v. *United States,* 355 U.S. 339; *United States* v. *Blue,* 384 U.S. 251; *United States* v. *Arcuri,* 405 F. 2d 691 (C.A. 2), certiorari

[5] The fact that the subsequent complaint issued against Jasinski was dismissed on the government's motion—an issue first raised on appeal—shows at most that at that time the government did not believe it had sufficient evidence to convict him. This view changed with the obtaining of the fingerprint evidence. The original decision to dismiss the complaint has no bearing on the issue of the validity of the original arrest. *Brinegar* v. *United States,* 338 U.S. 160, 172–173.

denied, 395 U.S. 913; *United States* v. *Braico*, 422 F. 2d 543, 545 (C.A. 7), certiorari denied, 398 U.S. 912; *Reyes* v. *United States*, 417 F. 2d 916, 919 (C.A. 9). See, also, *United States* v. *Ryan*, No. 758, October Term, 1970, decided May 24, 1971, slip op. 3.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[6] It is further contended by petitioner Bartoli that the failure to record the grand jury testimony is a matter which this Court should rectify in the exercise of its supervisory power. As the court of appeals pointed out, the Federal Rules of Criminal Procedure permit, but presently do not require, recordation of grand jury testimony. See Rule 6(d). That rule has been uniformly upheld by the courts of appeals (Pet. No. 70-259, p. 3A). See, *e.g.*, *Loux* v. *United States*, 389 F. 2d 911, 916 (C.A. 9), certiorari denied *sub nom. Thomas* v. *United States*, 393 U.S. 869. There is no reason for plenary review of this issue in the instant case. The government held two pre-trial conferences with defense counsel and disclosed the documentary evidence to be used. During trial, statements of witnesses were produced under 18 U.S.C. 3500 (*e.g.*, T. 27, 77, 522, 848-853, 983, 1158, 1324, 1833-1836). Moreover, as the court of appeals pointed out, district courts within the Seventh Circuit—including the District Court for the Northern District of Illinois—have adopted a local rule requiring recordation (Pet. No. 70-259, p. 4A).

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CERTIORARI DENIED N.C.R.